> although I think it comes about in a funny way, but I think ***we do have a ruling on the merits at least as to the 1983 claim***.

(Record 11-125-27) (emphasis added).

In his suits, Lapides alleged a string of discriminatory and retaliatory acts based on his religion, ethnicity, and speech. As the district court concluded, none of these contentions has merit. The allegedly wrongful acts are summarized under the following headings.

PROMOTION AND TENURE

After four years at KSU, Lapides applied in September 1997 for tenure, to be effective in academic year 1998-1999. He was granted tenure, as was recommended by all five required levels of review. (Record 6-89-Ex. B at ¶ 4, Discovery Docs. D 1571).

In August 1998, just when his tenure became effective and less than one year after applying for it, Lapides applied for promotion from assistant to associate professor for academic year 1999-2000. (Docket No. 73 (Lapides Dep.)-271, 274; Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 01068, 01072; Record 6-89-Ex. A at ¶ 8).

The KSU policy in effect at the time stated specifically that an assistant professor generally would not be promoted unless the professor showed "substantial progress" toward a doctorate. (Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 02130, 02231). Lapides was denied promotion because he did not have a doctorate and had made no progress toward one. (Record 6-89-Ex. B at ¶ 4, Discovery Docs. D 1371-76).

At KSU, all 13 of the applicants seeking promotion from assistant to associate professor for academic year

1999-2000 who were in fact promoted had terminal degrees. (Record 6-89-Ex. A at ¶¶ 13-16, 20, attached documents). Five of the seven applicants who were denied promotion, including Lapides, did not hold doctoral degrees and only possessed masters. The other two applicants had doctoral degrees but were denied on other grounds. (Record 6-89-Ex. A at ¶¶ 13-16, 20, attached documents).

SEXUAL HARASSMENT COMPLAINTS

Clay Complaint

In 1996, Velvet Clay, a female student at KSU, took an evening course from Lapides. (Docket No. 92 (Clay Dep.)-7-8). One night after class, Lapides called Clay at her home. (Docket No. 73 (Lapides Dep.)-79; Docket No. 92 (Clay Dep.)-10). Clay alleged that during the telephone call he told her she was attractive, asked about her sexual preferences, asked if she "was into S & M," and stated that he didn't know if he could continue to conduct the class because her beauty distracted him. (Docket No. 92 (Clay Dep.)-11-12). It is undisputed that Lapides called Clay on at least one other occasion, although they disagree as to the contents of the call. (Docket No. 72 (Lapides Dep.)-125). Clay said that Lapides called to apologize for his comments. (Docket No. 92 (Clay Dep.)-20).

After the phone calls, Clay contacted Terri Lavelle, Administrative Coordinator to Dean Timothy Mescon. (Docket No. 92 (Clay Dep.)-19). Clay asked for guidance regarding what to do and how to get out of the class. (Docket No. 92 (Clay Dep.)-22). Lavelle told Clay to contact Teresa Joyce-Covin, Ph.D., Chair of the Department. (Docket No. 92 (Clay Dep.)-22). Clay contacted Joyce-Covin

and explained the situation. Joyce-Covin arranged for Clay to finish the course by independent study, and Clay did not return to Lapides' class. (Docket No. 92 (Clay Dep.)-24-25; Docket No. 51 (Joyce-Covin Dep.)-96).

Clay chose not to file a formal complaint. Clay testified that her main concern was graduating, and she did not want to be involved in a formal sexual harassment investigation or complaint. (Docket No. 92 (Clay Dep.)-30, 60). Lapides testified that he had no reason to believe that Clay, in complaining about him, was motivated by anti-Semitism. (Docket No. 73 (Lapides Dep.)-113).

Lunn Complaint

In July 1997, Laurie Lunn a former student of Lapides, who had graduated from KSU in May 1997, contacted Joyce-Covin and informed her of allegedly inappropriate statements and conduct by Lapides during a course she had taken from him in the fall of 1996. (Docket No. 91 (Lunn Dep.)-10-12; Docket No. 51 (Joyce-Covin Dep.)-54).

Joyce-Covin met with Lunn and referred her to KSU EEO officer Melvis Atkinson, Ph.D. (App. 96a-97a). Lunn met with Atkinson and filed a formal notarized complaint of sexual harassment against Lapides. (Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 5361-62, 5384-87; Docket No. 91 (Lunn Dep.)-7-8, 13).

Lunn complained that during class Lapides spoke of his sex life, experiences in dating, visiting bars and picking up women, men soliciting hookers, his need to be in control over women, the fact that women always complain, overseas practices in which women are burned when their husbands die and female babies are killed, blaming

women if they are harassed and do not say anything about it, and a conversation two men had about women's underwear. (Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 02050-51).

Atkinson interviewed Lapides, Joyce-Covin, and eight of the students who had been in Lunn's class. (App. 100a; *Compare* Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 03693 *with* PL 05379). The students generally did not support Lunn's allegations. (Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 05379). One female student, Julie Burtz, did support the allegation that before class and at the end of class Lapides talked about going to bars and picking up women. (Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 05379).

On August 28, 1997, Atkinson completed her investigation and wrote Lapides stating that "[t]his office has completed its investigation of the charge of sexual harassment brought against you. . . . Evidence gathered during the investigation did not support the claim of a sexually hostile environment alleged to have been part of [your] class." Atkinson added, "there was at least one other student in the class who had concerns about your conduct, joke telling, before and end of the class lectures. In light of this, I suggest that at all times you display a professional educational atmosphere. . . . " Atkinson requested that Lapides make an appointment with her office to view an educational video on sexual harassment. (Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 02058, 05388-89, D 532).

On August 29, 1997, Atkinson met with Lapides and told him the findings of her investigation, that the evidence gathered did not support the claim of sexual harassment. (App. 100a; Exhibit B at ¶ 4, Discovery Docs. PL

05379). Lapides expressed to Atkinson his concern that the letter was insufficient clearance. Lapides "kept insisting that [Lunn] had defamed him." (Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 05380). Lapides stated that he did not know why Lunn would do this except because he is Jewish. (Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 05380). Atkinson said that as far her office was concerned the investigation was over, and she had no indication that anyone involved was motivated by Lapides' race or religion. (Record 6-89-Ex. B at ¶ 4, Discovery Docs. PL 05380).

Lunn testified that she was not aware that Lapides was Jewish at the time of her complaint against him, during the investigation, or even later. (Docket No. 91 (Lunn Dep.)-40). Furthermore, Lunn testified that she has no bias towards Jewish people and that Lapides' religion and ethnicity had nothing to do with her complaint. (Docket No. 91 (Lunn Dep.)-40).

Buckalew Complaint

On November 17, 1998, Ken Robinson, Ph.D. ("Robinson"), another KSU Coles College professor, faxed a "draft" memorandum to Mescon dated November 12, 1998. The memorandum alleged that Lapides had an inappropriate conversation with a "former student" of Robinson's, who was later identified as Mindy Buckalew, regarding Robinson's sexual habits and requested Lapides' dismissal. (App. 114a). Mescon reviewed the memo, placed it in a file, but took no action regarding it, nor did he share its contents with others. (Docket No. 47 (Mescon Dep.)-149-50).

On November 28, 1998, Mescon, Devine, Joyce-Covin, and Lavelle met with Buckalew to discuss her allegations of possible assault and sexual harassment by Lapides and

concerns for her safety. (Docket No. 52 (Devine Dep.)-228-30, 240-44; Docket No. 47 (Mescon Dep.)-157-58). Ted Cochran, KSU Chief of Police, attended a portion of the meeting and advised Buckalew that she should contact the Cobb County Police Department ("CCPD") since the alleged assault took place off campus. (Docket No. 68 (Cochran Dep.)-50-51).

Buckalew never filed a complaint with KSU. (Docket No. 93 (Buckalew Dep.)-90, 196). Thus, KSU took no action. Cochran never formally investigated any complaints by Buckalew although he obtained a copy of the police report filed by Buckalew with CCPD. (Docket No. 68 (Cochran Dep.)-22, 25-26).

On December 12, 1998, Buckalew went to CCPD and filed a complaint against Lapides alleging that she had received phone calls from Lapides that were sexual in nature, that Lapides assaulted her, and put a gun in her mouth. The Cobb County police were unable to substantiate Buckalew's claims and the case did not proceed. (Docket No. 93 (Buckalew Dep.)-14; Record 6-89-Jt. Dep. Ex. 24).

OTHER ALLEGED ACTS OF DISCRIMINATION AND RETALIATION

Proposed Reassignment of a Graduate Class

In August 1998, Department Chair Joyce-Covin proposed that Lapides' only graduate course be reassigned to another professor, Carlotta Roberts. (App. 112a; Docket No. 51 (Joyce-Covin Dep.)-245). While Joyce-Covin was finalizing the schedule of courses to be offered, she determined that there were too many entrepreneurship electives being

offered for the spring term. Therefore, Joyce-Covin moved the Lapides course to the summer term and, because Lapides had already made clear he did not want to teach during the summer, Joyce-Covin asked Roberts to teach the course. (Docket No. 51 (Joyce-Covin Dep.)-245). After some of Lapides colleagues told Joyce-Covin that they thought Lapides should teach the course, she moved the course to the fall term and allowed Lapides to teach it. (Docket No. 51 (Joyce-Covin Dep.)-245-46). Lapides agreed that the proposed reassignment, which was not put into effect, had no effect on the compensation, benefits, or terms of his employment. (Docket No. 73 (Lapides Dep.)-277-78).

Changes in Track Assignment

Coles College at KSU has three workload tracks:

> Track A the teaching-service model, which requires more teaching and less intellectual contributions than would otherwise be expected;
>
> Track B the teaching-scholarship-service model, which requires a balance of teaching and scholarship and hence a lower course load; and
>
> Track C the teaching-scholarship model, which requires the highest intellectual contributions and the lowest course load.

(Docket No. 47 (Mescon Dep.)-48-54; Record 1-89-Jt. Dep. Ex. 41; Record 1-89-Ex. B at ¶ 4, Discovery Docs. D 59).

Faculty in the School of Business Administration can select, subject to approval by the department chair, one of the three workload options. (Docket No. 47 (Mescon Dep.)-58-62). According to Mescon, "[P]art of the departments

'chair's responsibility is to see that the mix of workload options selected by the faculty allows the department to accomplish the mission of the School of Business Administration . . . ,' which means each chair has to assure some type of balance among his or her faculty regarding faculty workload assignments in each department. . . . It is the chair's administrative responsibility to make these assignments." (Docket No. 47 (Mescon Dep.)-62).

When Lapides was originally hired by KSU, he was on Track A, the teaching-service track. (Docket No. 51 (Joyce-Covin Dep.)-216; Docket No. 59 (Lasher Dep.)-30-31). Lapides was later allowed to purchase course releases with contract money he had, giving him a course load similar to Track B. (Docket No. 51 (Joyce-Covin Dep.)-217-18). When KSU converted to the semester system in the fall of 1998, Joyce-Covin notified the faculty that the department would no longer support course releases and everyone would be required to teach his or her specified load. (Docket No. 51 (Joyce-Covin Dep.)-218).

With the conversion, Lapides would have been expected to return to a Track A course load. (Docket No. 51 (Joyce-Covin Dep.)-218). However, Lapides and Joyce-Covin decided jointly to move Lapides to Track B with the understanding that he must meet the intellectual contribution requirements. (Docket No. 51 (Joyce-Covin Dep.)-222; Record 1-89-Ex. B at ¶ 4, Discovery Docs. PL 06660-61, 05446).

In March 2000, Harry Lasher, Ph.D., the new Department Chair, reassigned Lapides to Track A based on the department's needs and the fact that Lapides was originally hired under Track A. (Docket No. 59 (Lasher Dep.)-39). In fairness, Lasher allowed Lapides another

year on Track B to finish up his research. (Docket No. 59 (Lasher Dep.)-39-41; Exhibit B at ¶ 4, Discovery Docs. PL 06087-89).

At the time of his deposition, Lapides believed he should be on Track B. (Docket No. 73 (Lapides Dep.)-262). However, he claimed that, when he was reassigned to Track B by Joyce-Covin, he objected to the change. (Docket No. 73 (Lapides Dep.)-262; Record 1-89-Ex. B at ¶ 4, Discovery Docs. PL 06046).

Performance Rating

In his February 1999 review, Lapides was rated "Above Expectations" in teaching and service, but "At Expectations" for intellectual contributions. His overall rating was "Above Expectations." (App. 121a; R1-89-Ex. B at ¶ 4, Discovery Docs. PL 06058-60).

Proposed Reassignment to Administrative Job

In January 2000, Lapides became ill and missed three weeks of classes. (App. 127a-128a). He was informed that if he missed 20% of his classes he would be reassigned to an administrative position for the remainder of that term. (App. 128a-129a).

Lapides complained to Mescon and Lasher that any such reassignment would be motivated by anti-Semitism and retaliation. (App. 130a). Lapides made this accusation although Mescon is a prominent and devout Jew. (Docket No. 47 (Mescon Dep.)-236).

Lapides returned to work, met with Mescon and Lasher, and was allowed to continue teaching without

being reassigned to administrative duty. (Docket No. 47 (Mescon Dep.)-292). The proposed reassignment, which was not implemented, had no effect on the terms or conditions of Lapides' employment.

REASONS FOR DENYING THE WRIT

I. HAVING FAILED TO APPEAL ALL OF THE GROUNDS UPON WHICH THE DISTRICT COURT BASED ITS GRANT OF SUMMARY JUDGMENT, LAPIDES PRESENTS NOTHING FOR REVIEW.

In the Eleventh Circuit and in his petition to the Supreme Court, Lapides has appealed only from the district court's grant of summary judgment on the basis of res judicata. Lapides has not appealed from the district court's grant of summary judgment on the alternative grounds that his discrimination and retaliation claims fail on their merits. Lapides tells the Court that the district court's ruling on the merits is "not material to this Petition." (Petition at 8 n.1). He is seriously mistaken.

The district court adopted the magistrate judge's conclusions that, as to his discrimination claim, Lapides could not show that "the alleged acts were motivated by religious discrimination" and that "Plaintiff has not satisfied his *prima facie* case of hostile work environment based on his religion, and therefore **RECOMMENDS** that Defendant's Motion for Summary Judgment be **GRANTED** as to Plaintiff's Title VII religious discrimination claim." (App. 11a, 68a, 76a) (emphasis original).

Similarly, as to Lapides' Title VII retaliation claim, the district court adopted the magistrate judge's conclusions that adverse summary judgment be granted inasmuch as Lapides did not engage in protected activity and did not suffer an adverse employment action. Thus, the district court adopted the following conclusion: "Plaintiff has not made out a prima facie case of retaliation and therefore [the Magistrate Judge] **RECOMMENDS** that Defendant's motion for summary judgment be **GRANTED** with respect to Plaintiff's retaliation claim." (App. 11a, 85a) (emphasis original).

Normally, an appellant appeals from and raises issues as to all grounds upon which the district court based its judgment. *See, e.g., Scott v. Prudential Securities, Inc.*, 141 F.3d 1007 (11th Cir. 1998) ("Scott also appeals the district court's alternative holding"). Moreover, the appellate court usually addresses all of the bases for the lower court's decision. *See, e.g., Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 76-77 (1994) (addressing "the Court of Appeals' alternative basis for striking down the New York scheme"); *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 430 (1992) (addressing "[t]he Court of Appeals' alternative holding"); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889-90 (1990) (same); *U.S. Dept. of Labor v. Committee on Legal Ethics of the West Virginia State Bar*, 494 U.S. 715, 727 (1990) (same); *Federal Maritime Commission v. Pacific Maritime Ass'n*, 435 U.S. 40, 41 (1978) ("[t]he Court of Appeals also erred in its alternative ground of decision"); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141 (1968) ("[t]here remains for consideration only the Court of Appeals' alternative holding"), *overruled on other grounds, Copperweld Corp. v. Independence Tube*

Corp., 467 U.S. 752, 783-84 (1984); *Miami Heart Institute v. Sullivan*, 868 F.2d 410, 412 n.2 (11th Cir. 1989) (addressing and finding district court's "alternative holding" erroneous).

Lapides has failed adequately to appeal the district court's judgment against him. By failing to appeal all of the grounds adopted by the district court (but instead appealing from only one of them), Lapides in effect concedes that the lower court's decision was correct. In other words, if one unplugs the res judicata ground from the district court's judgment, the decision still stands on the basis of other grounds, as to which Lapides has not appealed. This is a simple matter of logic. He has thus failed to perfect his appeal and presents nothing for review.

The Fifth Circuit recognized this principle in *Hicks v. Quaker Oats Co.*, 662 F.2d 1158 (5th Cir. Unit A 1981). The court acknowledged that "one alternative ground will support the judgment." *Id.* at 1168. Therefore, according to the court, "the losing litigant has little incentive to appeal another ground even if erroneous." *Id.* In other words, because a single ground will support a court's judgment, it makes no sense for a party to appeal a putatively erroneous ground unless the party can show that all the grounds are erroneous.

Lapides' failure to raise in the Eleventh Circuit or his petition to this Court any issue as to the district court's alternative holdings is fatal to his appeal. And it is too late now for Lapides to appeal the alternative grounds supporting the judgment. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court.").

II. THE COURT OF APPEALS DID NOT ERR IN CONCLUDING THAT LAPIDES HAD IMPERMISSIBLY SPLIT HIS CAUSES OF ACTION AND HIS SECOND SUIT IS BARRED BY RES JUDICATA.

The district court correctly based its grant of summary judgment in part on res judicata and the Eleventh Circuit correctly affirmed on this basis. (App. 1a-4a. 8a-11a, 62a). Unlike Lapides' contentions, the lower courts did not misapply the doctrine.

In order for res judicata to apply, there must have been a prior suit involving the same parties, the same issues must have been raised or it must be true that they could have been raised, and there must have been a decision on the merits as to some issue. *San Remo Hotel, L.P. v. City and County of San Francisco*, 125 S.Ct. 2491, 2500 (2005) ("'Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'" (*quoting Allen v. McCurry*, 449 U.S. 90, 94 (1980))).

As the lower courts held in the present case, all of the requirements of res judicata are met here. Lapides filed a prior suit against the University System in which he could have raised the Title VII issues he presents in this second suit. Even though Lapides had not received a right-to-sue letter when he filed his first suit, case law strongly supports the conclusion that he could have raised his Title VII claims in that suit and res judicata therefore applies.

Res judicata has consistently been applied where employment discrimination plaintiffs, who have not yet obtained a "right-to-sue" letter, failed to bring Title VII

claims in a prior suit arising from the same events. Courts have reached this result even though one may not file a Title VII claim without a right-to-sue letter. 42 U.S.C. § 2000e-5(f)(1). In *Jang v. United Technologies Corp.*, 206 F.3d 1147 (11th Cir. 2000), which the Eleventh Circuit followed in the instant case (App. 1a-4a), the plaintiff filed an initial complaint raising several claims, including violations of the Americans with Disabilities Act ("ADA"). *Id.* at 1148. The district court granted summary judgment against the plaintiff. It rejected the ADA claim because the plaintiff had not obtained a right-to-sue letter and disposed of the remaining claims on other grounds. The plaintiff then obtained a right-to-sue letter and filed a second suit. The Eleventh Circuit held that the ADA claim was barred by res judicata even though the plaintiff could not have properly raised it in is first suit due to the absence of a right-to-sue letter. The court noted that, even if one regarded the dismissal of the ADA claim in the first suit as not being on the merits, the district court had granted summary judgment on the merits of the other claims. According to the court, res judicata or claim preclusion does not allow a plaintiff to "split causes of action to bring, for example, state law claims in one suit and then file a second suit with federal causes of action after receiving a 'right to sue' letter." *Id.* at 1148-49.

In *Jang*, the Eleventh Circuit cited and followed cases from three other circuits (the Second, Sixth, and Seventh):

> At least three other Circuits have rejected similar arguments and held that plaintiffs may not split causes of action to bring, for example, state law claims in one suit and then file a second suit with federal causes of action after receiving a "right to sue" letter. *See Heyliger v.*

> *State Univ. & Community College Sys. of Tenn.*, 126 F.3d 849, 855-56 (6th Cir. 1997) (noting that plaintiff had duty to request right to sue letter and amend state complaint); *Brzostowski v. Laidlaw Waste Sys., Inc.*, 49 F.3d 337, 339 (7th Cir. 1995) (explaining that plaintiff could not split causes of action and bring a federal claim later); *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 41 (2nd Cir. 1992) (stating that plaintiffs may avoid claim preclusion by filing their other claims and seeking a stay to await the Title VII administrative proceeding or by filing the other claims and then amending after obtaining the right to sue letter). In the most analogous case, *Rivers v. Barberton Board of Education*, 143 F.3d 1029 (6th Cir. 1998), the Sixth Circuit affirmed the application of res judicata to bar a suit involving a Title VII claim after the court had dismissed a factually related federal claim on the merits in a prior suit between the parties. *See Rivers*, 143 F.3d at 1032. We agree with these other Circuits, and the district court in this case, and hold that res judicata barred Appellant from splitting his causes of action and bringing his ADA claim after his first suit proceeded to a judgment on the merits.

Id. at 1149.

The Ninth Circuit reached the same conclusion in *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708 (9th Cir. 2001). The plaintiffs' Title VII claims were dismissed on res judicata grounds inasmuch as the plaintiffs had filed a prior action based on the same facts that was dismissed with prejudice. *Id.* at 710-11. The plaintiffs contended that their new Title VII suit was not barred by res judicata because they had not yet received right-to-sue

letters. Citing other circuits (the First, Second, Third, Sixth, Seventh, and Eleventh) that have reached the same conclusion, the Ninth Circuit ruled:

> Finally, Appellants argue that res judicata cannot apply because they were barred from bringing their Title VII claims in the previous action in light of the fact that they had not yet received their "right to sue" letters from the EEOC. Though we have never addressed this issue in a published opinion, we now join our sister circuits in holding that Title VII claims are not exempt from the doctrine of res judicata where plaintiffs have neither sought a stay from the district court for the purpose of pursuing Title VII administrative remedies nor attempted to amend their complaint to include their Title VII claims. *See Heyliger v. State Univ. & Cmty. College Sys. of Tenn.*, 126 F.3d 849, 856 (6th Cir. 1997) (holding that plaintiff was subject to claim preclusion because he failed to litigate a Title VII claim in a prior state court proceeding); *Herrmann v. Cencom Cable Assocs., Inc.*, 999 F.2d 223, 225-26 (7th Cir. 1993) (stating that "[p]arties to Title VII actions enjoy no immunity from res judicata"); *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 40-41 (2nd Cir. 1992) (Title VII claim not exempt from res judicata where plaintiff made no effort in prior action to seek a stay from the district court or amend her complaint to include Title VII claim); *see also Boateng v. InterAmerican Univ., Inc.*, 210 F.3d 56, 63 (1st Cir. 2000) (Title VII claim subject to res judicata where plaintiff received right to sue letter during pendency of first action); *Jang v. United Techs. Corp.*, 206 F.3d 1147, 1149 (11th Cir. 2000) (adopting Title VII analysis and concluding that ADA claim was not exempt from res judicata where plaintiff failed to

> obtain right to sue letter during pendency of first action); *Churchill v. Star Enters.*, 183 F.3d 184, 193-94 (3rd Cir. 1999) (same).
>
> Appellants had ample time to secure "right to sue" letters prior to filing their first action in November of 1995. Alternatively, they could have sought a stay from the district court pending their administrative proceedings before the EEOC. In light of Appellants' failure to exercise either option, we conclude that their Title VII claims are barred by the doctrine of res judicata.

Id. at 714. *See also Havercombe v. Dep't of Educ. of Puerto Rico*, 250 F.3d 1, 4-8 (1st Cir. 2001). Because the plaintiffs in *Owens* failed to secure right-to-sue letters at an earlier time and failed to seek a "stay from the district court pending their administrative proceedings before the EEOC," their Title VII claims were barred by res judicata. *Owens*, 244 F.3d at 714.

Summarizing, at least seven circuits have now held that Title VII plaintiffs are subject to res judicata when they try to bring separate suits for Title VII violations. Respondent is aware of no circuits that have held to the contrary. Title VII plaintiffs cannot, therefore, bring separate suits based on the same facts and avoid the effect of res judicata from prior suits by alleging that they had not yet received right-to-sue letters at the time of the prior suits.

The circumstances are more compelling here than in *Jang* and *Owens* for the application of res judicata inasmuch as Lapides obtained a right-to-sue letter while his first suit was pending. Nevertheless, Lapides failed to move to amend so as to add the Title VII claim, although he pled in his first suit that he would do so and the district

court found that he could have amended or moved to stay the case. (App. 10a-11a, 61a). In *Jang* and *Owens*, the plaintiffs did not obtain right-to-sue letters until after their first suits had been dismissed and thus, unlike Lapides, did not have the opportunity to amend. *Jang*, 206 F.3d at 1148; *Owens*, 244 F.3d at 711.

Lapides argues here that there was only a "partial judgment" on federal claims in his first suit. (Petition at (i), 12, 19).[1] He contends that the application of res judicata in these circumstances "vastly expands the contours of res judicata doctrine." (Petition at 12).

This argument is fallacious. It ignores federal courts' common practice of making determinations on the merits of federal claims and dismissing without prejudice or remanding state law claims. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 & n.7 (1988) ("when federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice"); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-27 (1966); 28 U.S.C. § 1367(c)(3) (a district court "may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . the district court has dismissed all claims over which it has original jurisdiction").

As shown above, an adverse decision on the merits was reached in Lapides' first case. In that case, Lapides' federal claims against the University System were decided

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[1] Riding a different horse, Lapides argued in the Eleventh Circuit that "There was no final judgment in this case upon which to base res judicata." (Brief of Appellant at 17).

against him. The United States Supreme Court ruled in *Lapides'* first case:

> [B]ecause Lapides' only federal claim against the State arises under 42 U.S.C. § 1983, that claim seeks only monetary damages, and we have held that a State is not a "person" against whom a § 1983 claim for money damages might be asserted. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). [cit. omitted]. Hence ***this case does not present a valid federal claim against the State***. . . . It has also become clear that, in the absence of any viable federal claim, the Federal District Court might well remand Lapides' state-law tort claims against the State to state court. 28 U.S.C. § 1367(c)(3).

Lapides v. Board of Regents, 535 U.S. at 617 (emphasis added); *id.* at 624 (concluding "that this case, now rais[es] only state-law issues"). This conclusion was part of the Supreme Court's judgment. (Record 9-105-Ex. P).

Recognizing that the Supreme Court had "held that the Plaintiff had no valid federal claims pending;" the district court then remanded to state court the remaining state law claims against the University System. The court also noted that "[a]ll federal claims ha[d] been dismissed." (Record 6-89-Ex. I, at 3). Therefore, in Lapides' first case, the district court held that his federal claims against the University System were in fact adjudicated on their merits.

Plainly, the decision of the Supreme Court served as the ultimate judgment in Lapides' first case. (Record 9-105-Ex. P). The mandate of the Eleventh Circuit recognized that, after the Supreme Court's judgment, "only

state-law claims remain." (Record 9-105-Ex. Q). These remaining state claims were eventually dismissed by Lapides "without prejudice" after remand. (Record 6-89-Ex. J).

As the district court recounted and as noted above, Lapides "conceded at the oral argument on Defendant's Motion for Summary Judgment that there was a decision on the merits of the § 1983 claim." (App. 62a n.14). Lapides' counsel stated: "[W]e do have a ruling on the merits at least as to the 1983 claim." (Record 11-125-27).

In *Jang*, the Eleventh Circuit correctly held that it is not necessary, in order for res judicata to apply, that a final judgment has been entered on all claims in the first case. *Jang v. United Technologies Corp.*, 206 F.3d 1147, 1148-49 (11th Cir. 2000) (even if the dismissal of the ADA claim in the first suit was not on the merits, res judicata applied because the district court had granted summary judgment on the merits of the other claims). In a recent Title VII case, the Seventh Circuit reaffirmed that a federal district court renders a final judgment for res judicata purposes when it dismisses some claims on the merits and dismisses other claims without prejudice. *Hill v. Potter*, 352 F.3d 1142, 1144 (7th Cir. 2003).

As the district court held, it is manifest that Lapides could have brought his Title VII claims in his first case against the University System:

> Plaintiff has not explained why he did not file his administrative charge earlier, or seek to stay the case upon filing it so that he could obtain the right-to-sue letter in order to prevent the

> splitting of actions which should have been brought together. Plaintiff's failure to obtain the right-to-sue letter until after a point at which it might have been procedurally impossible to stay the case or amend his complaint is no different from the predicament of those plaintiffs who failed to obtain the right-to-sue letter until after a point at which they could not stay the case or amend their complaint because the complaint had been dismissed. Accordingly, the undersigned finds that Plaintiff has not shown that he could not have brought his Title VII claims in the prior lawsuit.

(App. 10a-11a, 61a).

Thus, under controlling authority, Lapides' present suit under Title VII is barred by res judicata. All of the conditions exist that are necessary for res judicata to apply, including a decision on the merits in the prior suit.

III. LAPIDES DID NOT RAISE HIS EQUITABLE EXCEPTION ARGUMENT BELOW AND THERE IS NO REASON TO ADOPT IT.

Lapides now argues for the first time that an equitable exception to res judicata should be recognized in Title VII cases. This suggestion should be rejected as untimely and unwarranted.

Lapides did not argue in the lower courts that an equitable exception to res judicata should be recognized. As noted above, "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). *See also*

Singleton v. Wulff, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). Thus, the Court should refuse to entertain this argument.

Moreover, there is no reason to create an equitable res judicata exception to help Lapides or other non-diligent Title VII plaintiffs. As Lapides acknowledges, this Court in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), rejected equitable exceptions to res judicata based on "public policy" or "simple justice." *Id.* at 401. (Petition at 15-16). The Court reaffirmed: "There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.'" *Moitie*, 452 U.S. at 401 (cit. omitted). And, as quoted above, the district court ruled (and there is no evidence to the contrary) that Lapides could have sought a stay or amended his first suit in order to present his Title VII claim there.

CONCLUSION

For these reasons, the Court should deny the petition for writ of certiorari, declining the invitation to unsettle the law of res judicata in order to aid a non-diligent litigant.

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No. 04-1643

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In The Supreme Court of the United States

PAUL D. LAPIDES,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondent's threshold objections to this Petition regarding ripeness and justiciability have no merit. Nor does Respondent's disparagement of the cert-worthiness of this application for review.

1. Respondent first asserts, see Brief in Opposition ("Op. Cert.") 15-17, that because Lapides allegedly failed to appeal all of the grounds upon which the district court based its judgment, review in this Court is precluded. This contention seriously misapprehends the record below, and misconstrues this Court's precedents as to the justiciability of claims. (Respondent also seriously mischaracterizes the underlying facts and allegations of Lapides' complaint, but it is not pertinent to this Petition).

To begin with, Lapides *did* reserve before the court of appeals his arguments concerning the district court's ostensible ruling on the merits of his employment claims (aside from the district court's ruling on res judicata). In briefing before the Eleventh Circuit, Lapides noted:

> In its order granting Defendant's motion for summary judgment, the District Court discussed only res judicata as the ground for granting the motion (*See* R10-126-3 to -4) [see also Pet. App. 7a-11a]. Although the District Court stated in the last paragraph of the order that it was adopting the Magistrate's Final Report and Recommendation (*See* id. at -5) [see also Pet. App. 11a], the District Court Judge did not discuss or reference the Magistrate Judge's alternative holdings in his

> order, and the alternative bases for recommending summary judgment in this case would be dicta in light of the District Court's adoption of the res judicata bar to the lawsuit. Therefore, Appellant has limited his argument in this brief to the res judicata issue. If the Court concludes that the District Court granted summary judgment on the alternative grounds articulated by the Magistrate Judge, Mr. Lapides respectfully incorporates by reference his Objection to the Magistrate's Final Report and Recommendation (*See* R10-122) and asks the Court to permit him to file a supplemental brief on the subject.

Brief of Appellant, *Lapides v. Board of Regents of the University System of Georgia*, at 1 n.1 (11th Cir. Docket No. 04-12161-H) (filed June 2004). See also Reply Brief of Appellant, id., at 2 (filed August 2004) (after quoting the above statement, Lapides observed that "there was no 'failure' to address all the grounds articulated by the District Court, as alleged by Appellee. Nor has Mr. Lapides conceded anything regarding the alternative recommendations of the Magistrate Judge.").

Not only did Petitioner completely preserve his position on the underlying merits issues before the court of appeals, it is manifestly clear from the Eleventh Circuit's decision that it concerns only the res judicata issue. See Pet. App. 1a ("The district court held that the suit was barred by res judicata."); 4a ("[T]he district court did not err in granting summary judgment to the Board based on res judicata."). Under this Court's precedents, Lapides was under no obligation to present to this Court a question not actually

resolved by the court of appeals below. See *Delta Airlines v. August*, 450 U.S. 346, 362 (1981); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980).

2. Respondent also asserts, Op. Cert. 26-27, that Lapides failed to raise before the Eleventh Circuit his argument for an equitable exception to res judicata principles, as recognized by other Title VII cases. But this, too, is erroneous.

The main case relied upon by Lapides in his briefing before the court of appeals was the Eleventh Circuit's own decision in *Jang v. United Tech. Corp.*, 206 F.3d 1147 (11th Cir. 2000). See Brief of Appellant, supra, at (iii) (indicating, on Table of Authorities, *Jang* was a principal case). The *Jang* decision clearly recognized that there can be equitable exceptions to the application of res judicata principles in the Title VII/employment discrimination case context. See 206 F.3d at 1149 n.3 ("Appellant asks the Court to find manifest injustice or equitably modify the doctrine of res judicata on these facts. Appellant suggests that the alleged failings of the EEOC and the OFCCP prevented Appellant from receiving a "right to sue" letter. We see no basis for an equitable modification on the facts of this case.").

Also insofar as Lapides argued before the Eleventh Circuit that there is no res judicata preclusion in this case, see Reply Brief of Appellant, supra, at 3-8, fairly subsumed in that issue is the question of whether res judicata should equitably apply on the facts presented here. Petitioner has adequately preserved, for review by this Court, the issue of equitable exceptions to res judicata in Title VII cases.

3. The remainder of Respondent's submissions, see Op. Cert. 18-26, attempt to disparage the worthiness of this Petition for this Court's attention. Glaringly omitted from

Respondent's discussion is the obvious impact that a decision by this Court on this Petition would have in resolving a signal and difficult procedural issue in many Title VII cases. As Petitioner has already observed, see Pet. 22-23, he is not seeking a sweeping set of equitable or other exceptions to the standard set of presumptions regarding claim-splitting or other situations involving the typical application of res judicata principles. But where, as here (and Respondent does not appear to deny it), it is the *employer's* litigation conduct in a case (such as taking a questionable position as to sovereign immunity and litigating it to the highest court in the land) that results in an employee having to split his or her claims in separate proceedings, such an exception is surely justified.

Just as significant, Respondent persists in taking the position that a mere "decision on the merits" qualifies to trigger res judicata. See Op. Cert. 4, 18 ("In order for res judicata to apply . . . there must have been a decision on the merits as to some issue."), 23, 26. What Respondent clearly illides is this Court's requirement of a *final judgment* in a case. See *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876); *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Respondent implies that the "federal lawsuit" on which there had been a "decision on the merits," only includes the federal claims to which Petitioner could have possibly moved to add his federal Title VII cause of action. Respondent ignores the fact that Lapides's original lawsuit, filed in state court and removed to federal court by Respondent, included both state and federal claims, and there is no legal support for its implied position that a ruling on the merits of the federal claims splits the lawsuit such that future federal claims are precluded by res judicata, but state claims are not.

Far from succeeding in raising concerns as to the cert-worthiness of the issues raised in this Petition, Respondent – by the positions they expressly and impliedly take – actually reinforces the need for this Court's plenary review. In the thousands of Title VII cases filed each year in both federal and state court, claim-splitting and res judicata problems arise in a substantial minority of filings. It is incumbent on this Court, in the wise exercise of its discretion for review, to resolve these questions.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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